The claimant bases his right to recover in the present action solely on the provisions of section 1230, by virtue of which, he contends, his dismissal by the President has become void. If, however, the claimant was dismissed from the Army by the joint action of the President and the Senate in superseding him, section 1230 does not apply to his dismissal and there is no basis for the present suit.

B. *The President, with the approval of the Senate, appointed an officer to supersede the claimant.*

The claimant has made the point (Brief, pp. 38–40) that it does not appear that the President and the Senate appointed any officer to supersede him. The facts show, however, that Lt. Col. Robert S. Smith was appointed to supersede the claimant. On March 1, 1918, the President nominated two officers to be colonels in the Quartermaster Corps of the Army. One of these officers was nominated to rank from February 23, 1918, and the other, Lt. Col. Smith, was nominated to rank from February 14, 1918. (Finding IV.) The date from which this nominee was to rank coincides with the date of the claimant's dismissal, and clearly indicates that he was nominated to replace the claimant.

Further evidence of this is furnished by the fact that on March 1, 1918, when the President nominated two officers to be colonels in the Quartermaster Corps there was only one vacancy in this position outside of the office made vacant by the dismissal of the claimant. Since the President had no authority to add to the number of colonels

authorized by law in the Quartermaster Corps (*Montgomery* v. *United States*, 5 Ct. Cl. 93, 98), it is necessary to hold, either that the President intended one of the two nominees for colonel to replace the claimant, or that he was unlawfully attempting to add to the number of colonels authorized by law.

The President having nominated Lt. Col. Robert S. Smith to replace the claimant and the Senate having confirmed the nomination, the appointment of this officer superseded the claimant and dismissed him from office. This result is not affected by the fact that the Senate, when it approved the appointment of Lt. Col. Smith as colonel in the Quartermaster Corps, was not informed that this officer was nominated to replace the claimant. Since under the Constitution the President alone has the power to make nominations, he alone has the power to determine their nature and character. When the Senate approves a nominee for appointment made by the President the resulting appointment has the nature and character of the President's original nomination and is not affected by the Senate's knowledge or lack of knowledge of its nature or character.

The respective functions of the President and Senate relative to appointments are discussed by Attorney General Butler in 3 Op. A. G. 188. The President had nominated John R. Coxe to be a lieutenant in the Navy and the Senate had approved the appointment with the added proviso, "to take rank next after Lt. Elisha Peck." The Attorney General held that under these circumstances John R.

Coxe could not be commissioned as a lieutenant in the Navy. He could not be commissioned so as to rank as lieutenant from the date of his appointment since the President's nomination in this form had not been approved by the Senate. He could not be commissioned to rank next after Lt. Peck, since commissioning him in this manner would involve an appointment which would have originated with the Senate. The Attorney General in regard to such a commission said (pp. 189, 190):

> The Senate has no power to originate an appointment; its constitutional action is confined to a simple affirmation or rejection of the President's nomination. * * * This, however, would involve the irregularity of making the Senate, so far as regards the date of rank, the proposers of the measure, thus reversing the order of action prescribed by the Constitution.

It has been squarely held by this court that when an officer is dismissed from the Army by the appointment of a successor, the dismissal dates, not from the date of the nomination of the successor or from the date of confirmation of the nomination by the Senate, but from the date from which the successor was nominated to rank. (*McElrath* v. *United States*, *supra*; *Blake* v. *United States*, *supra*, p. 237; *Keyes* v. *United States*, *supra*, p. 339.)

Lt. Col. Robert S. Smith was nominated to rank as colonel from February 14, 1918. In the present action claimant seeks to recover pay as colonel from February 13, 1918, to March 12, 1919. It follows

that if the claimant was superseded by the appointment of Robert S. Smith as colonel, he is not entitled to recover anything in the present action.

II.

The claimant waived his rights under section 1230 by his delay in applying for trial.

Section 1230 permits officers dismissed by the President to apply for a trial by court-martial on the charges upon which they were dismissed. Although the section provides that, upon such application, the President shall convene a court-martial "as soon as the necessities of the service may permit," and in any event within six months, the section does not state within what time the dismissed officer must make his application for trial.

Obviously there must be some time limit within which dismissed officers must act. If no such time limit existed, dismissed officers would occupy a position where they could in most cases thwart the President's action. They could wait until the witnesses against them had disappeared and then make their application for trial. They could also, by delaying a number of years, make their living outside the military or naval service and later, through the operation of section 1230, become entitled to the pay of an officer of the Army or Navy over a period of years during which they had rendered no services.

In *Newton* v. *United States*, 18 Ct. Cl. 435, the court, in considering whether the claimant in that

case could invoke the provisions of section 1230, said (p. 444):

> We are of the opinion that an officer illegally or wrongfully dropped from the rolls by the President, under the act of 1870, should demand his restoration or make his application for court-martial within a reasonable time. Long delay, by changes, promotions, and appointments, may work great confusion in the Army Register and great injury to many officers. Witnesses disappear and facts are forgotten.

The court held under the facts of the above case that "the law should presume acquiescence" by the claimant in his dismissal.

The question of what is a "reasonable time" within which a claimant must apply for trial to preserve his rights under section 1230 must be considered from the standpoint both of the dismissed officer and of the Government. On the part of the dismissed officer no delay is necessary. The application itself is simply a form for which no facts need be gathered or documents prepared. The officer needs time for only one thing—making up his mind whether or not to apply for a trial. For this a few days or, at most, a few weeks are all that can reasonably be necessary.

From the point of view of the Government the question of what was a reasonable time in this case within which to apply for trial must be judged in the light of the fact that the country was then at war. At that time changes, promotions and appointments in the Army were being made daily in great numbers.

Witnesses within the United States were likely to be sent to foreign fields at any moment. In a very brief time the principal witnesses against an officer might become unavailable in the sense that to assemble them would be to disturb military activities and administration.

The claimant in this case waited from February 13, 1918 to July 16, 1918, more than five months, before applying for trial. Since delay beyond a period of two or three weeks could be of no advantage to the claimant, and since a greater delay was such as naturally would, and in fact, did prejudice the Government, the claimant must be held to have so far acquiesced in his dismissal that he can not now invoke in his behalf the provisions of section 1230.

III.

Section 1230 does not give an officer dismissed by the President any right to pay after his dismissal.

The Articles of War in effect in 1918 were enacted by the act of August 29, 1916, 39 Stat. 651. Article 118 provides:

> Officers—Separation from service.—No officer shall be discharged or dismissed from the service except by order of the President or by sentence of a general court-martial; and in time of peace no officer shall be dismissed except in pursuance of the sentence of a court-martial or in mitigation thereof; * * *

This Article recognizes and affirms the power of the President to dismiss an officer from the military service in time of war. If, however, the proper con-

struction of section 1230 is that any officer dismissed by the President can nullify the latter's action by simply applying for trial by court-martial, the President has no effective power of dismissal. Article 118, affirming the President's power to dismiss in time of peace, is, therefore, inconsistent with section 1230 as so interpreted.

Since section 6 of the act of August 29, 1916, enacting Article 118, provides that "all laws and parts of laws in so far as they are inconsistent with this act are hereby repealed," section 1230 was repealed by this act if its meaning is that a dismissal by the President is nullified if no court-martial is convened within six months after the dismissed officer applies for trial. The Court of Claims took this view, saying:

> Our opinion is that section 1230 is superseded by the Articles of War enacted as part of the act of August 29, 1916, 39 Stat. 651, 669. [Rec., page 10.]

It must be noted that section 1230 itself recognizes and affirms the President's power to dismiss an officer. It permits any officer "*dismissed* by order of the President" to apply for trial by court-martial, and it provides that a court-martial shall be convened to try such an officer "on the charges on which he *shall have been dismissed*." It further provides that if a court-martial is not convened within six months, or if, being convened, it does not award dismissal or death, "the order of dismissal by the President shall be void."

It is well settled that a dismissed officer can not be restored to the service except by a new exercise of the appointing power. (*Mimmack* vs. *United States*, 97 U. S. 426; *United States* vs. *Corson*, 114 U. S. 619.) If, therefore, section 1230 means what it says in referring to officers "dismissed" by the President and to a trial on the charges on which the officer has been "dismissed," the section, in so far as it attempts to reinduct dismissed officers into the service otherwise than by a new exercise of the appointing power, is unconstitutional.

When section 1230 was adopted as section 12 of the act of March 3, 1865, 13 Stat. 489, it was the currently accepted opinion that the President could by Executive action, and without making a new appointment with the consent of the Senate, restore an officer previously dismissed by him. The facts in *United States* v. *Corson*, *supra*, show that President Johnson in June, 1865, issued an order purporting to restore to the service an officer whom President Lincoln had dismissed in March of that year. Prior to the year 1878 a number of cases came before the Court of Claims in which the facts showed that the President had purported to restore to the service an officer whom he had previously dismissed. (*Smith* v. *United States*, 2 Ct. Cl. 206; *Winter* v. *United States*, 3 Ct. Cl. 136; *Reynold* v. *United States*, 3 Ct. Cl. 197; *Montgomery* v. *United States*, 5 Ct. Cl. 93.) The court in all these cases did not question the President's power to revoke his dismissal and restore the dismissed officer to the military service. That the President had no constitutional power to restore a

dismissed officer to the service otherwise than by a new appointment was first held by this court in the October term, 1878, in *Mimmack* v. *United States*, 97 U. S. 426.

Congress in passing the act of March 3, 1865, undoubtedly believed that an officer dismissed from the Army would be restored to his former office if the order dismissing him was revoked. It therefore left the President's power of dismissal undisturbed, but provided that under certain circumstances the order of dismissal was to be considered revoked, believing that the dismissed officer would thereby be restored to his position. This court has held, however, that a dismissed officer has the same status as one who has never been in the military service and that he can regain his position only in the manner provided in the Constitution for appointment to office. It follows that the relief which Congress intended to give to dismissed officers was ineffective and that claimant can not rely upon it in claiming the pay and allowance of a colonel after the date of his dismissal by the President.

The judgment should be affirmed.

Respectfully submitted.

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